

Cce, Chandigarh Vs. M/S Skynet Builders, Developers, Colonizer and Others

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-23-2012

Judge : The Honourable Mr Justice S.S. Kang, Vice President & the Honourable Mr Justice Mathew John, Member (Technical)

Appeal No. : Service Tax Appeal No. 463, 464, 465, 466, 468, 470, 639 of 2008, Cross Objection No.97 of 2009

Appellant : Cce, Chandigarh

Respondent : M/S Skynet Builders, Developers, Colonizer and Others

Advocate for Pet/Ap. : For the Appearing Parties: Amrish Jain, A.R. J.P. Kaushik, with Vikrant Kackaria, Rajesh Mehra, Advocates.

Judgement :

Per Mathew John, J.

1. In this proceeding eight appeals filed by Revenue against different Respondents are being considered together. These cases are being taken up together because the main issues involved in all these appeals is the same.

2. In the case of Appeal No. 639/2008 filed with respondents as Shresth Colonisers (P) Ltd, the position is that there is demand for Rs. 9,34,739- for the period Oct 2005 to June 2006 which was confirmed against the Respondents but set aside by the Commissioner(Appeal). The Revenue is in appeal against the

order of Commissioner (Appeal). But this demand includes an amount of Rs.2,50,000/- towards tax and Rs. 1,44,909/- towards interest paid by the respondents earlier but was refunded to them.

3. In the remaining seven appeals, the Respondents had paid service tax and later claimed refund of such service tax paid because the CBEC had clarified vide letter F. No. 332/35/2006-TRU dated 01-08-2006 and also vide circular 96/7/2007-ST dated 23-08-2007 that such tax was not payable by them. The adjudicating officer rejected their contention. The Respondents went in appeal against the adjudication order. The Commissioner (Appeal) allowed the appeals. Aggrieved by the orders of the Commissioner (Appeals), Revenue has filed the appeals.

4. The Respondents are builders/promoters for constructing residential complexes. They identify prospective buyers for flats and enter into agreements for sale of constructed flats and take money from the persons with whom they had agreements to sell the built flats. They finally transfer the built flats to the buyers and register it in the names of the buyers. The period involved was prior to enactment of Finance Act, 2010. The question involved in these appeals is whether the respondents were doing any service for the prospective buyers or were doing the construction activity for themselves and were only engaged in sale of flats with no component of service to the buyers. This matter has been a subject matter of many disputes.

5. The definition of the service under section 65(105) (zzzh) of Finance Act, 1994 was amended by Finance Act, 2010 to add an explanation. The amended definition is reproduced below.

“(105) taxable service” means any service provided or to be provided, -

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(zzzh) to any person, by any other person, in relation to construction of complex;

Explanation. For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;

6. The impugned orders are passed before the above explanation was added and the appeal also is filed before the explanation is added. However during the argument the Ld. A. R. for Revenue relied on the explanation and that is the reason why the definition along with the explanation is reproduced for convenience.

7. The Ld A. R. for Revenue argues that the amendment made vide Finance Act, 2010 was to add an explanation and that even without the explanation the meaning of the entry was always the same. The Ld. A.R. points out the fact that the Honourable High Court of Punjab and Haryana in the case of G. S. Promoters Vs. UOI -2011 (21) STR 100 (PandH) had decided in similar situation that there is a service being rendered by the builder to the prospective customers and therefore service tax was rightly leviable and the order of the Commissioner (Appeal) to refund the tax collected is not legally maintainable.

8. The Ld. A. R also argues that the Commissioner (Appeal) has erred in deciding that there was no unjust enrichment involved in the impugned situation.

9. The Advocates for Respondents argue that the explanation added by Finance Act 2010 cannot be taken into account for deciding this matter which relates to earlier period. No retrospective effect has been given to the explanation added. The Supreme Court in the case of UOI Vs. Martin Lottery Agencies Ltd has ruled that such explanations causing adverse consequence to the public cannot interpreted to have retrospective effect. They also point out that the case before the High Court of Punjab and Haryana in the case of G. S. Promoters was the constitutional validity of the explanation added and not whether the explanation has retrospective effect. The Advocates for the Respondents rely on the following

decisions were it was held in facts of similar nature that there was no service involved:

(a) Magus Construction Pvt. Ltd Vs. UOI-2008 (11) STR 225 (Gau)

(b) CST Vs Shrinandnagar-IV Co-Op. Housing Society Ltd -2011 (23) STR 439 (Guj);

10. They also rely on the clarification issued by CBEC vide 108/02/2009 ST dated 29-01-09 reading as under:

Subject: Imposition of Service tax on Builders - Regarding.

Construction of residential complex was brought under service tax w.e.f. 1-6-2005. Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment. The 'Construction of Complex' service has been defined under Section 65 (105)(zzzh) of the Finance Act as 'any service provided or to be provided to any person, by any other person, in relation to construction of a complex. The 'Construction of Complex' includes construction of a 'new residential complex'. For this purpose, 'residential complex' means any complex of a building or buildings, having more than twelve residential units. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of 'construction of residential complex to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale.

Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/ developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of

the undersigned.

11. So the Counsels for Respondents argue that during the period under dispute the impugned activity did not involve any service to the prospective buyers and the construction activity undertaken by the Respondents were for their own benefit to meet the contract for sale of future flats to be constructed and therefore the orders of the Commissioner (Appeal) is proper.

12. We have considered arguments on both sides. We find that the issue whether the explanation has retrospective effect has been decided in the case of Shrinandnagar-IV Co. Op. Housing Society Ltd. against Revenue. Considering the entry that was in force during the relevant time and the clarifications issued by CBEC till 2009, we are of the view that the case of the Revenue fails on merits.

13. With the above finding the demand against M/s Shresth Colonisers gets set aside except to the extent of service tax amount Rs. 2,50,000/- and interest of Rs.1,44,909/- which was paid but refunded to them. This matter requires further examination. In the case of other respondents the issue is one of refunds and requires further examination.

14. Now the issue to be decided is whether the principle of unjust enrichment will apply to such refund and if it applies whether there will be unjust enrichment if the amounts are refunded.

15. One of the grounds taken by the Respondents is that section 11B of the Central Excise Act relating to refund has not been made applicable to Service tax Levy and there is no provision regarding unjust enrichment in Finance Act, 1994.

16. In the matter of unjust enrichment, the Ld. AR points out that the Commissioner (Appeal) has allowed the claim on the ground that it was not a ground mentioned in the Show Cause Notice and that the adjudicating authority has gone by presumption that the incidence has been passed on. He points out the decision of the Honourable Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd Vs. CCE reported in 2005 (181) ELT 328 (SC) that principle of unjust-enrichment will apply for refund of Service Tax also even though such

principle is not specifically incorporated in Finance Act, 1944 and section 11B of Central Excise Act is not specifically made applicable to refund of service tax. Extracts from the said order of the Apex court is re-produced below.

“From the above discussion, it is clear that the doctrine of ‘unjust enrichment’ is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden to consumers and if such relief is not granted, he would suffer loss.”

17. In view of the decision of the Apex Court as above there is no doubt that principle of unjust enrichment is to be taken into consideration by every authority at the time of sanctioning refund of taxes paid. Therefore we are not able to agree with the finding of the Commissioner (Appeal) that the principle of unjust enrichment was not raised in the SCN and hence it cannot be raised in the adjudication order. However there is an issue that the Respondents were not given opportunity by the adjudicating authority to substantiate their claim that principle of unjust enrichment will not apply in their case. The Commissioner (Appeal) did not examine the issue because he was of the opinion that the ground cannot be raised because it was not mentioned in the SCN. So the issue is being examined by Tribunal for the first time.

18. We have examined the written submissions given by two of the Respondents namely M/s Skymet Builders Developers and M/s Apartment Construction to prove their claim that there was no unjust enrichment. The evidences produced by them are the following:-

(a) The fact that tax was paid under protest because of continuous pressure from the departmental officials;

(b) Certificate of chartered accountant to the effect that tax has not been passed to the customers;

(c) Balance sheets for the Financial years 2006-07 and 2007-08 showing the amount as receivables;

(d) An affidavit from the company to the effect that the tax has been borne by the company and not passed on to the customers.

19. There is no clear rule yet to determine whether an incidence of taxation has been passed on to the consumers. Where the amount is billed as tax and collected from customers there can be a clear finding that incidence is passed on. But the Apex Court has held that even in other cases incidence can be held to be passed on. The decision of the Apex Court in the case of UOI Vs. Solar Pesticides Pvt. Ltd 2000 (116) E.L.T. 401 (S.C.), illustrates such finding of the Apex Court. Courts have been reluctant to admit Chartered Accountant's certificate as conclusive proof in the matter. The decision in CCE Ltd Vs. BPL Ltd-2010 (259) E.L.T. 526 (Mad.) is an illustration. Entries in balance sheets also cannot prove anything in a conclusive manner because amounts can be recovered from the prospective buyers on some other pre-text but shown to be paid from their own profit margin and which amount can be accounted as amounts expected to be received as refund in future. For conclusive evidence what is required is to show that the prices were agreed to with the buyers before they started paying service tax and the price remained the same without any increase on other pretexts till the delivery of the flat to the prospective buyers. No such clear evidence is produced. Another test can be the competitive market forces which decide the prices which force the person providing service from charging anything extra from the consumer or bargaining power of the buyers due to which he cannot be forced to pay anything extra. The prices of ready built flats are not of a type decided by competitive forces in the market especially after the buyer makes initial deposit and the builders are in a position to pass on the cost to the buyers on some pretext or the other. In many situations some the prospective buyers join a project much after the project has started and the prices for such buyers are different from the price for those who join the project initially. Exhaustive data showing that all persons who bought

the flats joined the project before the Respondents started paying service tax and that nothing over and above the amount initially agreed to before the Respondents started paying service tax will be required to come to a clear conclusion that there is no unjust enrichment in this case.

20. Since the Tribunal does not propose to decide the issue without any finding by either of the lower authority we are remanding the matter to adjudicating authority for examination of all evidences that may be produced by the Respondents to prove their claim.

21. Cross-objection in Appeal No. ST/645/08 is in the nature of written submissions to support the arguments of the Commissioner (Appeals). No separate relief is prayed for. So cross-objection also is disposed of as per the order disposing the appeal.

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